

# IOWA DEPARTMENT OF NATURAL RESOURCES

## ADMINISTRATIVE CONSENT ORDER

IN THE MATTER OF: /

CRESTON ROOFING AND  
SIDING, INC.

REG. NO. 198913817, LUST NO. 9LTF88

ADMINISTRATIVE CONSENT  
ORDER  
2011-UT-05

TO: Terry L. Mullin  
203 S. Lincoln  
Creston, IA 50801

Creston Roofing and Siding, Inc.  
Attn: Terry L. Mullin  
1453 Cromwell Road  
Creston, IA 50801

### I. SUMMARY

The Iowa Department of Natural Resources (Department) and Creston Roofing and Siding, Inc. (Creston Roofing) hereby agree to the following Administrative Consent Order (Order). Creston Roofing agrees to submit a Tier 2 site assessment report within 90 days and pay an administrative penalty of \$5,000 within 30 days to the Department. See Sections IV and V for more details.

Any questions regarding this Order should be directed to:

**Relating to technical requirements:**

Tammy Vander Bloemen  
Iowa Department of Natural Resources  
Henry A. Wallace Building  
Des Moines, Iowa 50319-0034  
Ph: 515/281-8957

**Relating to legal requirements:**

Aaron Brees, Attorney  
Iowa Department of Natural Resources  
502 East 9th Street  
Des Moines, Iowa 50319-0034  
Ph: 515/281-5965  
aaron.brees@dnr.iowa.gov

**Payment of penalty to:**

Director of the Iowa DNR  
Wallace State Office Building  
502 East Ninth Street  
Des Moines, Iowa 503219-0034

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## II. JURISDICTION

This Order is issued pursuant to Iowa Code sections 455B.474(1)(f)(11) and 455B.476, which authorize the Director of the Department to issue any order necessary to secure compliance with Iowa Code chapter 455B, Division IV, Part 8 and Department rules contained in chapter 567 Iowa Administrative Code (IAC) 135. Iowa Code section 455B.109 and administrative rules in chapter 567 IAC 10 authorize the Director to assess administrative penalties up to \$10,000.

## III. STATEMENT OF FACTS

The Department and Creston Roofing hereby agree to the following statement of facts:

1. Creston Roofing is the owner and/or operator of a facility located at 1453 Cromwell Road, Creston, Iowa, and has been at all times relevant to this Order.
2. In 1997, Creston Roofing removed a 560 gallon underground storage tank (UST) which it had previously operated at the facility. Soil and groundwater samples taken at that time found contaminant levels in excess of state action levels, triggering the tiered assessment process.
3. A Tier 1 site assessment report was originally due on June 16, 1998. After several delays and due date extensions, the Tier 1 report was received by the Department in March 2000.
4. Results of the Tier 1 assessment required that the site be assessed at the Tier 2 level. A Tier 2 report was originally due on August 3, 2000. Multiple past due notices were sent, extending the deadline to November 27, 2000 and then again to March 7, 2001.
5. Rex Mullin, owner of Creston Roofing at the time, claimed that he was unable to pay for the Tier 2 assessment. On September 8, 2004, the Department sent Mr. Mullin paperwork that would allow him to demonstrate an inability to pay for the assessment. He was given 60 days to return the documents.
6. On November 17, 2004, the Department sent Rex Mullin a final notice letter regarding the ability to pay documents, giving him an additional 30 days to reply. No response was received.
7. In November 2005, following years of inaction by Creston Roofing, the Department and the Iowa Comprehensive Petroleum Underground Storage Tank Fund (Fund) agreed to add the site to the state closure contract. This would have allowed the Tier 2 assessment to be conducted at state expense, with the Fund having the ability to place a lien on the property to potentially recover the expended funds. This program was

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explained to Rex Mullin, and he was asked to sign an access agreement allowing GeoTek Engineering & Testing Services, Inc. (GeoTek) to enter the property to perform the assessment work.

8. On December 2, 2005, the Department and GeoTek met with Rex Mullin to inspect the site and answer any questions regarding the work to be done. Mr. Mullin signed the access agreement, allowing the project to move forward.

9. On December 19, 2005, the Department was informed by GeoTek that it had received a phone call from a son of Rex Mullin's, Rod Mullin, stating in very strong terms that GeoTek should not enter the property.

10. On December 20, 2005, the Department, GeoTek, and Rod Mullin participated in a teleconference in which they agreed that, prior to the Tier 2 assessment being conducted, additional groundwater and soil gas samples would be evaluated.

11. Samples were collected on January 9, 2006. Analysis found benzene levels above the state action level. This confirmed the need for a Tier 2 assessment; however Rex Mullin failed to respond to correspondence seeking to move forward with the assessment.

12. Following a second teleconference on April 13, 2006, the Department agreed to collect additional groundwater samples to verify the accuracy of GeoTek's January 9, 2006 results. These samples were collected on July 17, 2006 and were split with Rod Mullin so that he could submit them to a laboratory of his choosing. Results from both halves of the samples showed benzene levels of 18,000-21,200 ppb. Additional groundwater sampling on November 30, 2006 showed a benzene level of 18,000 ppb.

13. Due to the groundwater test results and the Mullins' refusal to allow GeoTek to work at the site, the Department sent a letter to Rex Mullin on July 27, 2007, requiring that groundwater and soil gas samples be collected annually to monitor for changes in contaminant levels, and a site monitoring report (SMR) be submitted by October 30 of each year until the access situation was resolved and the Tier 2 completed. Mr. Mullin failed to conduct this monitoring or submit the SMRs.

14. Rex Mullin passed away in November of 2009. On May 27, 2010, the Department sent a letter to Terry Mullin, son of Rex Mullin and executor of the Rex Mullin estate, and to Ed Harvey, attorney for the Rex Mullin Estate, presenting two options: conduct the Tier 2 assessment as required, or sign an access agreement allowing GeoTek to conduct the assessment under the state closure contract.

15. Discussions between the Department and Jamie Mullin, son of Rod, grandson of Rex, took place into September 2010. On September 13, 2010, Jamie Mullen emailed the Department stating that the family had decided to move forward with the Tier 2 assessment, but had not yet selected a contractor. The Department has not been notified

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of any certified groundwater professional being contracted to complete the assessment, and no progress toward conducting the assessment has been made to date.

#### IV. CONCLUSIONS OF LAW

The parties hereby agree that the following conclusions of law are applicable to this matter:

1. Iowa Code chapter 455B, Division IV, Part 8 (sections 455B.471-455B.479) establishes the UST program. Section 455B.472 declares that the release of regulated substances, including petroleum products, from USTs constitutes a threat to the public health and safety and to the natural resources of the state, and this regulatory program is necessary to adequately address this concern. Iowa Code section 455B.474 authorizes the Environmental Protection Commission (Commission) to adopt rules related to release detection and prevention, financial responsibility, tank closure, site assessment, risk classification, corrective action, and reporting and record keeping requirements applicable to all owners and operators of USTs. The Commission has adopted such rules in 567 IAC chapters 135 and 136.
2. Iowa Code section 455B.471(6) defines an "owner" of USTs. Creston Roofing was an owner of USTs at the above referenced facility and has been at all times relevant to this Order.
3. Iowa Code section 455B.471(5) defines "operator" of USTs as "...a person in control of, or having responsibility for, the daily operation of the underground storage tank." Creston Roofing was an operator of the above referenced facility at all times relevant to this Order.
4. Iowa Code section 455B.474(1)(f) requires the Commission to adopt rules to establish corrective action response requirements for the release of regulated substances, including petroleum. The Commission has adopted "risk-based corrective action" (RBCA) rules in 567 IAC 135.8-10. Subsection 135.9(2) states that "...a Tier 1 assessment must be completed in response to release confirmation..." or "...reliable laboratory analysis which confirms the presence of contamination above the action levels in 567—135.14(455B).". Contamination was confirmed at the site, triggering the RBCA rules and requiring a Tier 1 assessment.
5. 567 IAC 135.10(1) states that a "Tier 2 assessment must be conducted and a site cleanup report submitted for all sites which have not obtained a no action required site classification... as provided in 567—135.9(455B)." Creston Roofing has not obtained a "no action required" site classification based on the results of the Tier 1 assessment work, and is therefore required to conduct a Tier 2 assessment.

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6. Creston Roofing has failed to submit a Tier 2 report to the Department. This is a violation of 567 IAC 135.10.

**V. ORDER**

THEREFORE, the Department hereby orders and Creston Roofing agrees to the following:

1. Creston Roofing shall pay to the order of the Department an administrative penalty of \$5,000 within 30 days of receipt of this Order.
2. Creston Roofing shall complete a Tier 2 assessment and submit a report to the Department within 90 days of receipt of this Order.
3. Creston Roofing shall undertake corrective action or site monitoring as required, based on the results of the Tier 2 assessment, on a schedule to be determined following the assessment.

**VI. PENALTY**

1. Iowa Code section 455B.477 authorizes the assessment of civil penalties in Iowa District Court of up to \$5,000 per day of violation for the violations involved in this matter. More serious criminal sanctions are also available pursuant to that provision.
2. Iowa Code sections 455B.476 and 455B.109 authorize the Commission to establish by rule a schedule of civil penalties up to \$10,000 which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties. See 567 IAC 10. Pursuant to this rule, the Department has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an Order with a penalty.

**ECONOMIC BENEFIT:** A Tier 2 report has been required since August 3, 2000. An average Tier 2 assessment costs \$18,000. By deferring these costs, Creston Roofing has benefitted by earning interest on this amount. Applying Iowa Department of Revenue interest rates for the relevant time periods produces the following benefit:

August – December 2000: \$18,000 @ 0.8% per month = \$720  
2001 – 2010: \$18,000 @ 8.1% per year = \$14,580  
January – April 2011: \$18,000 @ 0.4% per month = \$288

Total = \$15,588

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This economic benefit total assumes that Creston Roofing will conduct a Tier 2 assessment as agreed upon in this Order, and therefore will not benefit by avoiding the actual cost of that assessment. Because the Department has decided to handle this case administratively, and in light of the maximum penalty allowable, \$1,000 is assessed for this factor.

**GRAVITY:** A Tier 2 assessment has been required at the site since August 3, 2000. Creston Roofing has failed to submit the appropriate site assessment report for over ten years, leaving it unknown as to whether the site poses a threat to human health or the environment. Failure to perform an appropriate assessment undermines the effectiveness of the regulatory program, which is designed to prevent and minimize risks to human health and the environment. Accordingly, \$3,000 is assessed for this factor.

**CULPABILITY:** The Department has attempted to obtain an appropriate assessment of the contamination at this site for over ten years. The Department has explained on multiple occasions what needs to be done to comply; there is no doubt that all involved understand the law. Given the length of time involved, the extensive communications with the Department, and the many years of granted extensions, Creston Roofing's failure to comply is considered willful. As such, \$1,000 is assessed for this factor.

The total penalty calculation comes to \$5,000.

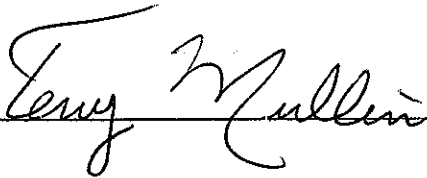
## VII. WAIVER OF APPEAL RIGHTS

Iowa Code section 455B.476, and 561 IAC 7.4(1), as adopted by reference by 567 IAC chapter 7, authorize a written notice of appeal to the Commission. This Order is entered into knowingly by and with the consent of Creston Roofing. By signing this Order all rights to appeal this Order are waived.

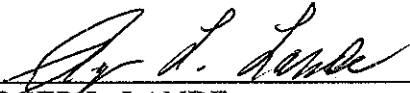
## VIII. NONCOMPLIANCE

Compliance with Section V of this Order constitutes full satisfaction of all requirements pertaining to the violations described in this Order. Failure to comply with this Order may result in the imposition of administrative penalties pursuant to an administrative order or referral to the Attorney General to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.477.

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Dated this 11 day of November, 2011

  
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ROGER L. LANDE  
DIRECTOR  
IOWA DEPARTMENT OF NATURAL RESOURCES

Dated this 28th day of November, 2011